CANADA'S SYSTEM OF JUSTICE

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PREFACE

The law is the basic regulator of our society. Through an intricate set of rules which constantly adjust and change, the law defines what is permissible and what is not, setting minimum standards for our behaviour and relationships with others.

Although our daily lives involve constant contact with it, many Canadians see the law as a mystery that can only be unravelled by lawyers, often at considerable expense. The purpose of this pamphlet is to demystify the subject by explaining the origins of Canada's system of law and justice and by showing how it operates. It does not attempt to be exhaustive but rather, to provide a basic understanding – to whet the reader's appetite. For those who wish to examine the subject further, a selective bibliography of recent "law for the layman" books is included at the end of the pamphlet.

SOURCE OF THE LAW

Our Canadian Constitution

A 'consitution' can be defined as the fundamental law of a state. It consists of all the rules, whatever their source, which determine the nature and manner of selection of the government, and the distribution and exercise of government power.

The British North America Act, a law passed by the British Parliament in 1867 at the request of the Fathers of Confederation, is often referred to as the Canadian Constitution. However, although it does provide the central framework for our constitution there are other important sources of constitutional law in Canada.

The Preamble to the B.N.A. Act declares that the new Dominion is to have a constitution similar in principle to that of the United Kingdom. One effect of this section of the B.N.A. Act is to include as part of our constitutional law, a number of great British fundamental laws such as the Magna Carta and the Habeas Corpus Act. This also means that many British customs and conventions about the administration of government and of justice form part of our constitution. One of the most important traditions we inherited from the United Kingdom is the "rule of law" concept. The rule of law (or the supremacy of law) means that the government itself is controlled by the law and must function within its terms. A Prime Minister, government inspector, or policeman must all obey the law in the same way as an ordinary citizen.

This principle operates, as part of our Canadian Constitution, to protect the citizen against possible abuses of authority by government officials. It expresses the ideal that our government shall be a government of laws and not of men.

Section 129 of the British North America Act incorporated for the new federal state the legal systems (both common and civil law) which existed in the four original provinces before Confederation. It should also be noted that each province has its own constitutional documents and statutes governing provincial legislatures and administration. The most important provisions of the British North America Act relate to the distribution of lawmaking powers between the federal and provincial governments.

Our Federal System

The B.N.A. Act creates a federal system of government for Canada by dividing the powers of government between the provincial legislatures and the federal parliament in Ottawa. Other nations, such as Australia and the United States also function with a division of powers between the central and local (state) governments. This model of government can be contrasted with a unitary state such as Great Britain where all power originates exclusively from the central authority.

The main distribution of powers is set out in sections 91 and 92 of the British North America Act. Section 91 gives the federal parliament authority over all matters except those subjects assigned exclusively to the provincial legislatures. Thirty-one specific powers are then listed as illustrations of this general power. Included are the regulation of trade and commerce, taxation, banking, incorporation of banks and the issue of money. Particularly important to this discussion is the power given to the federal authority over the criminal law.

Section 92 of the Act gives the legislature of each province the exclusive power to make laws on sixteen listed subjects. Included are property and civil rights, all matters of a merely local or private nature, municipal institutions in the province, and "The Administration of Justice". The power to administer justice includes setting up and maintaining the courts of civil and criminal jurisdiction in the province and setting out the procedure to be used in civil matters in those courts. Much, although not all, of private law, including the law of contracts, trusts and property, and the law of negligence, comes within the scope of "property and civil rights" reserved to the provinces.

It should be noted that certain important subjects are not covered in Sections 91 and 92. Education is dealt with in Section 93 and rests exclusively within the provincial jurisdiction. Agriculture and immigration are, according to Section 95, the concern of both the provincial and federal governments.

The B.N.A. Act establishes two levels of government. However, there is a third level namely, that of local government. The Act does not directly give any lawmaking power to municipalities. The power of any municipality to make laws is, therefore, delegated to

it by the provincial legislature, usually under a general law entitled the "Municipal Act". This is part of the provincial legislature's lawmaking power over "municipal institutions" and "matters of a merely local or private nature" granted by Section 92. The power to provide penalties for violation of municipal by-laws or ordinances is delegated by the provinces in the same way.

This three-tiered structure of government has important effects on the legal system in which we live. For example, if you let your dog run free, or you park your car on the street during designated no-parking hours, you probably have violated a municipal by-law or ordinance. If you drive too fast on a highway, or at night without your car lights on, you undoubtedly have violated a provincial highway traffic law. If you deliberately attack another person without justification, you have committed a criminal assault, in violation of a federal law, the Criminal Code.

As mentioned earlier, criminal law is one of the specific powers granted to the federal Parliament by Section 91 of the British North America Act. The Criminal Code, made under that power, applies to everyone throughout Canada. Highway traffic laws, on the other hand, are within the lawmaking powers granted to the provincial legislatures by Section 92 of the Act. This is why highway laws in one province may be different from those in a neighbouring province. You may also be subject to fines, penalties, or even imprisonment by these laws, just as you would if you had committed a crime exclusively within the federal Criminal Code, since the B.N.A. Act also gives provincial legislatures the power to impose penalties to enforce any law they are authorized to make.

In other words, the laws which affect us daily are made on three different levels of government: municipal, provincial and federal. The municipal lawmakers are usually members of a municipality, town, or regional council, while those at the provincial and federal levels are members of the provincial legislature or the federal Parliament.

Lawmaking

Laws start out as ideas expressing a political or social objective in broad general terms, such as "control pollution", "reduce foreign ownership"

"improve health services", and so forth. Before these broad ideas can become statutes, they must pass through a complicated series of developments deriving from our democratic process.

To begin with, a policy is formulated either in the highest levels of the public service or in the Cabinet. It is then sent to qualified members of the public service who draft proposed laws based on the policy, for final approval by the Cabinet. These proposed laws, called bills are then introduced in Parliament where they are considered, debated and amended. They become acts or statutes when they receive a majority of votes in Parliament and the royal assent formally given by the Governor-General. Provincial bills follow much the same course, namely, policy proposal, draft legislation, debate in the provincial legislature, a majority vote and royal assent given by the Lieutenant-Governor.

The complexity of modern life and the demands on government require much more lawmaking today than, say, fifty years ago. If our legislatures or federal Parliament had to pass all the necessary laws and regulations in detail, it would be a nearly impossible task. They often solve this by passing statutes which give only the most important details and general features of a particular law. At the same time, however, the statute will grant to a Minister or to an administrative body or official the power to adopt rules and regulations in order to carry out the intent of the law more specifically.

The Canadian Bill of Rights

In the United States, there exists a Bill of Rights entrenched in the American Constitution and protected from legislative curtailment or interference. There is nothing like this in the British North America Act which, following the British model, did not set down a comprehensive, explicit or written Bill of Rights. The only rights expressly guaranteed in the B.N.A. Act were limited to the educational rights of the Catholic or Protestant minority in some provinces (Section 93); and the language rights in the Parliament of Canada, the legislature of Quebec, and in the Federal and Quebec courts (Section 133).

However, over the years, a number of federal and provincial statutes were designed to protect the fundamental rights of the Canadian people. A good

example of this are the laws against discrimination passed by many provincial legislatures.

In 1960, the Canadian Parliament passed the Canadian Bill of Rights. It explicitly recognized existing rights and freedoms which had previously depended, for protection, on the traditions inherited from English Common Law. The Bill begins with the declaration that "there have existed and shall continue to exist without discrimination by reason of race, national origin, colour, religion, or sex" a number of human rights and fundamental freedoms:

"a) the right of the individual to life, liberty, security of the person and enjoyment of property, and the right not to be deprived thereof except by due process of law;
b) the right of the individual to equality before the law and the protection of the law;
c) freedom of religion;
d) freedom of speech;
e) freedom of assembly and association; and
f) freedom of the press."

Section 2 of the Bill declares that every law of Canada, unless Parliament expressly declares otherwise, shall be so interpreted as not to interfere with these rights or freedoms, and in particular that "no law of Canada shall be construed or applied so as to deprive individuals of certain stated rights". Most of these have to do with the criminal law and criminal procedure such as the rights of the accused to counsel, to a fair hearing, and to be presumed innocent until proven guilty.

The Canadian Bill of Rights is thus a directive to the courts to interpret and apply the law in a way that will protect basic human rights and fundamental freedoms. It also seeks to prevent Parliament from infringing such rights and freedoms by requiring the Minister of Justice to determine whether the provisions of any regulations or bills tabled in Parliament are inconsistent with the Bill of Rights and to report this to the House of Commons.

The Canadian Bill of Rights is even capable of nullifying provisions of a previous act of Parliament. This is demonstrated by the important case of *'The Queen v. Drybones'*, decided by the Supreme Court of Canada in 1969. An intoxicated Indian found off the reserve had been penalized according to Section 94 (b) of the Indian Act. However, this penalty was

substantially different than the one which would have been imposed for the same offence committed by other Canadians. The question, therefore, was whether this difference in penalty infringed the "equality before the law" guarantee. The Court ruled that this section of the Indian Act was inconsistent with the Bill of Rights, and therefore invalid, even though it was in force at the time the Bill of Rights was enacted.

In spite of this effectiveness, there are three important limitations on the scope and force of the Canadian Bill of Rights. First, it has no effect whatever on provincial laws. Second, it is an ordinary Act of Parliament, however extraordinary its contents, and can therefore be modified, or even repealed, by any other act of Parliament. Third, by a provision of the same act, the War Measures Act was amended. The effect of this amendment meant that any orders or regulations adopted under the authority of the War Measures Act would override the protections guaranteed by the Canadian Bill of Rights.

The Role of the Court

As we have noted previously, our constitution sets out the range of powers granted to the federal Parliament and provincial legislatures. What this means is that each level of government must restrict itself to passing laws on subjects which have been assigned to it by the B.N.A. Act. If either the federal Parliament or a provincial legislature passes a law on a matter which is not within its area of jurisdiction, then that law will be considered invalid since it goes beyond the powers (ultra vires) granted to that lawmaking body by our constitution. Its invalidity would be declared by the courts which act as the final authority on such questions.

Another function of our courts is to help explain what a piece of legislation means, that is, to interpret statutes. The draftsman of a statute, however wise and careful he may be, cannot give us a written law which will cover all possible specific happenings or contingencies. This is particularly true today when so many bills must be drafted in a very short time. Often therefore, the bill will state general propositions, using general terms, thus leaving it up to the judges to discover the meaning of its provisions as applied to the facts before them. Often this is not an easy task. For instance if a statute provides that "every motor vehicle shall be licenced" in a certain manner, does

this mean that an airplane will have to be licenced under the statute? Judges perform this task of interpretation, to the best of their ability, by following the cardinal rule of trying to discover the intent of Parliament or the legislature when it passed the statute.

The most common function of the court is the role it plays in settling private disputes and trying criminal charges. This role is examined in some detail later.

Common Law and Le Droit Civil

When we speak of common law as opposed to droit civil, we contrast two of the world's basic legal systems. Common law orginated in England and is in force today in most Commonwealth countries, in the United States, and in the private law of nine Canadian provinces. Le Droit civil originated in ancient Rome and prevails today in many Western European countries and in the private law of Quebec. In Canada, then Quebec is a droit civil province in its private law only, whereas, the other provinces are wholly 'common law'.

The common law began its development in feudal England after the Norman conquest in 1066 A.D. It is a system of rules based on statutes and on precedents of previous court decisions. Thus, the common law is made up of judicial decisions, and customary practices which have been applied over the years to actual cases and situations.

Of course, two cases are seldom exactly alike in their facts. Under such conditions, the court frequently needs to modify an earlier common law principle in order to reflect any new and important differences. In this way the law is able to grow and change with the times. Perhaps the most important way in which the law may be changed occurs when Parliament or a Provincial Legislature enacts a statute which overrides the common law dealing with the same point. Statute law will be discussed again in the next section.

Le droit civil has its roots in the legal codes prepared many centuries ago for the Roman Emperor Justinian and more recently for the Emperor Napoleon. The codification ordered by Napoleon became the model for the Civil Code of Quebec first enacted in 1866.

Very briefly, a Civil Code consists of relatively simple but, comprehensive statements of rules which embody general principles of law. In theory, when a court is considering a case, it does not consult the decisions of earlier courts (as occurs in a common law situation) but rather, it looks for the specific rule as found in an article of the Civil Code.

To contrast these two methods, consider this: the common law of negligence (carelessness causing injury to another) is embedded in several thousands of court decisions taking up many more thousands of pages in the law reports. The civil law of negligence of the province of Quebec, on the other hand, can be found in just three brief articles of the Quebec Civil Code, beginning with this basic rule: "Every person capable of discerning right from wrong is responsible for the damage caused by his fault. . ." (Article 1053).

As would be expected, the reality is considerably different from the theory. The common law of negligence is relatively simple and understandable. A lawyer in a common law province would not normally have to do much research to find the rule that the courts would probably apply to some specific accident case. Nor is the rule stated in Article 1053 of the Quebec Civil Code as simple as might at first appear. What, for example, does 'fault' mean? In reality, the Quebec courts, which use the Civil Code, do resort to prior decisions and to the works of respected legal authors in order to help them determine the meaning of the Code rules so that they may apply them to the cases they decide.

Thus the decisions of similar cases turn out to be remarkably alike under both the common law and the civil law. It is only the method by which the decision is reached that is different.

Common Law and Statute Law

We have seen that the guiding principle of the common law is to stand by past decisions. But an important qualification to this principle occurs when a statute law which changes the traditional rule is enacted by a Parliament or legislature. A statute overrides all the common law dealing with the same matter.

A simple example can be used to illustrate this point. Let us say that a careless pedestrian, while

hurrying to work, jay-walks across a busy street. He is knocked down and severely injured by a motorist speeding along the road. In this case, both parties could be said to have been at fault since one was jay-walking and the other driving too fast.

If the case had been decided many years ago when only the common law rules applied, the victim would not have been entitled to any financial compensation since his own negligence (however slight) contributed to the accident. Since 1924, however, statutes in all the common law provinces have abolished the common law rule. Nowadays, the injured person would be granted that fraction of the damages considered to be caused by the other party's fault. For example, if damages were estimated at $1,000.00 for pain and suffering, and the speeding motorist was considered 75% to blame, then the driver of the car (or his insurance company) would have to pay $750.00 to the injured victim.

ENFORCING THE LAW

Courts and Judges

The provincial legislatures and the federal Parliament make our laws, but it is the function of the courts to interpret and apply them in specific situations. To understand the court and its function, it is necessary to look at its composition and the roles of those who take part in its work. We will also examine the "adversary system" which is the method Canadian courts use to arrive at their decisions.

Canadian judges, magistrates, prosecutors, and court officers are appointed and not elected. The judges of the highest courts have a secure tenure of office up to a fixed retirement age (seventy or seventy-five) and may only be removed for severe misconduct or incapacity. This helps to ensure their independence and impartiality. The provincial government appoints the judges (called Magistrates or Provincial Court Judges) in the lowest court; the federal government appoints the judges in the higher courts.

All of the higher court judges, from the Supreme Court of Canada down, are chosen from the ranks of lawyers, collectively called "the Bar". The same is generally true of lower court judges, but there are some notable exceptions. For example, in some

specialized courts such as juvenile or family courts, other types of experience may be recognized as being of special value, and therefore the magistrates or justices in these courts may not be lawyers.

Lawyers

Lawyers are an important part of the machinery of justice. They are considered "officers of the court" reflecting their special functions and duties in upholding the law and in the administration of justice. They represent parties appearing before the courts in both civil actions and criminal proceedings, and in these situations are often referred to as "counsel". The initials "Q.C." after a lawyer's name mean "Queen's Counsel": a title of honour given by the government to lawyers it regards as especially experienced and competent.

Lawyers also assist and advise individuals, organizations and institutions (including governments) in all activities having a legal element. A lawyer appearing for a client in court is acting as a "barrister" and one engaged in such other activities as a "solicitor". These are English terms and carry over from the way in which the legal profession developed and is still organized in England, where there is a clear division between the two. Every Canadian lawyer, however, is both a barrister and a solicitor, although naturally some lawyers specialize in court or "barrister" work, while others, by far the greater number, devote themselves to the "solicitor" or office work of assisting and advising.

In Quebec the profession is divided between advocates (lawyers) and notaries. The advocate acts both as a barrister and solicitor. He may plead in court and also provide legal advice to his client. The notary may appear in court only on non-contentious matters such as adoption proceedings. He has the power to prepare certain documents, called "authentic" documents, such as wills, deeds of sale of real property, and marriage contracts.

In all the provinces, lawyers are organized into provincial law societies which control admission to the profession and discipline their members to maintain high standards. Before being admitted to practice, for instance, the potential lawyer must complete rigorous and lengthy education and training. While the programme differs in detail from province to province, it usually includes two years of university,

followed by three years of law school, up to a year of apprenticeship (called "articling" or "clerkship") under the supervision of a practicing lawyer and some special practice courses supervised by the law society.

The Jury

A jury is a group of persons summoned by law and sworn to hear and render a verdict upon a case. The case may be either a civil action or a criminal prosecution presented in court. The qualifications for jurors in civil trials are set out in the statutes of each province. The Criminal Code of Canada provides that a person, qualified by provincial law to sit on a civil jury, is also qualified to sit as a juror in criminal matters in that province. Usually there are twelve jurors. Manitoba and Quebec have special language provisions. In these two provinces, a jury may be part English-speaking and part French-speaking or composed entirely of one language group depending on the accused's mother tongue.

There are important democratic values which are protected and enhanced by jury trial. First, a jury of one's peers helps to ensure that the law and its administration will conform to the ordinary man's idea of what is fair and just. Second the jury safeguards an accused against potential arbitrariness amongst official members of the justice system (for example, judges, police, etc.).

The Adversary System

In our system of Justice, the method by which the court arrives at its decision is known as the "adversary" system. The word adversary means opponent; this indicates that the system pits parties against each other in order to bring out the truth of the matter in any dispute.

Under our system, it is assumed that each side, assisted by a lawyer, will present all the evidence that supports its own position. The trial Judge considers these disputed facts impartially and dispassionately in order to arrive at the truth. He may make rulings on trial procedure and on the admissibility of evidence, but he may not seek out or present evidence himself. Thus it can be seen that it is the parties involved, namely the plaintiff or the Crown and the defendant or the accused who take the initiative – not the judge.

In determining the rules of law which they will apply to decide a case, judges have available the three sources of law already mentioned: the Common Law, or body of past decisions handed down by the judiciary and permanently recorded; the Statute Law, or laws passed by Parliament and the legislatures (and by-laws passed by municipal governments); and the relatively new body of rules and regulations sometimes called Administrative Law, created by special government agencies and boards of the executive branch under authority granted by Parliament or the legislatures. In Quebec the judge will examine the Code or Statute Law which is applicable, past decisions of courts, and certain commentaries published by jurists who are acknowledged experts on the point of law in question. These commentaries are known as "la doctrine".

The adversary system is the result of a long process of historical development. It has proved to be an effective way to bring out the truth as to the facts and the proper interpretation of the law. This assists the judge and the jury (if there is one) to reach a correct decision.

Enforcing Rights: Civil Court Action

The law is roughly divided into two main areas; criminal law, and civil (meaning non-criminal) law. Although these two areas of the law developed in similar ways, there are clear and basic differences between them. Civil law is used to settle private disputes between individuals and other private parties. Crimes, referred to in Canadian law as offences, are the subject of criminal law. These offences involve conduct regarded as harmful to all or part of the community rather than simply to another individual.

Civil cases (which are called civil suits) are heard in various courts. Normally, it is the amount of money which is involved in the claim that determines which court will try the case. The name and powers of civil courts vary from province to province, but basically each civil court system has three levels. On the first level there may be two kinds of courts. First, there are the courts which deal only with their own specialized subjects, such as Juvenile Court, Surrogate Court and Family Court. Secondly, in some provinces, on the first level there may be a "Small Claims Court" which hears civil actions usually involving less than $1,000.

Most provinces have an intermediate court called either the County or the District Court depending on the province concerned. The monetary limit on affairs that these intermediate courts may consider varies from a low of $500.00 in one province to a high of $10,000.00 in another province. Finally, at the third level, we find the provincial high court. In some provinces this court is called the Superior or Supreme Court, in others it is called the court of Queen's Bench. There is no limit set on the matters which it may consider.

A civil suit arises because two parties differ on some matter involving financial transactions, property, contracts, a private injury (called a tort) or civil rights. The person who brings a suit is called the Plaintiff and the other party is the Defendant. If the action is for a small amount of money, it may be brought in a "Small Claims Court". In such a situation, the parties would not ordinarily be represented in the action by a lawyer. If the case involves more money or is brought in a higher court, both sides would normally engage a lawyer.

A civil suit begins when the plaintiff serves the defendant with an order of the Court, the most common of which is the Writ of Summons. This commands the defendant to "appear" in court to make his defence. If he fails to appear, a judgment may be given against him in default. If the defendant believes that he has a good defence against the claim he will get a lawyer and prepare to oppose the claim in court. It is at this point that most such cases are settled by negotiation between the parties and their lawyers and never reach the trial stage. Perhaps only two percent of the legitimate claims that could be pursued are actually taken to court.

If the case is eventually tried, because the plaintiff made the claim against the defendant, the burden is on him to show by evidence that the facts support his case. The plaintiff presents his case first. The plaintiff's witnesses are called first to testify by his lawyer. The witness gives his testimony in reply to the lawyer's questions, questions which bring out the evidence in support of the plaintiff's claim. Of course, all witnesses must testify under oath or under a solemn affirmation to tell the truth.

Afterwards, this same witness may undergo questioning (called cross-examination) by the defendant's lawyer. He will ask questions in an attempt to dispel the effect of the witness's previous testimony.

When the plaintiff has finished his presentation, it is the defendant's turn to present his own evidence and call his own defence witnesses should he so desire. They, too, may be subject to cross-examination, but this time by the plaintiff's lawyer.

The judge controls the kinds of questions which may be asked of a witness while he is giving testimony or being cross-examined. Sometimes, the judge may rule out certain questions as being inadmissible under the rules of evidence.

When both sides finish presenting their case, if there is a jury, the judge will sum up the evidence for their benefit. He will then "charge" the jury, that is, instruct them as to the applicable law.

The jury then retires to do its duty. The jurors must first decide what facts were proven by the evidence given in court. Next, they must apply the law that the judge instructed them with and reach their verdict. The judge will adopt the verdict and make it the judgment of the court.

Usually civil cases are tried by a judge alone. At the close of the case, after the lawyers have "summed up" their arguments, the judge will make his decision based on the law and the facts. His judgment will be either in favour of the plaintiff, or in favour of the defendant. Usually the court awards costs to the winner. If the case is short and uncomplicated the judge usually makes an oral decision "from the bench". If the case is complicated he may want to reserve his decision and issue it later in writing.

The great majority of judgments in favour of the plaintiff are for money damages. However, the court's judgment may include an "injunction" against the defendant, ordering him to refrain from doing something which the court has decided is wrong – such as burning excessive amounts of rubbish on his property and thus preventing his neighbour, the plaintiff, from enjoying his own property. The judgment may also be for what is called a "specific performance", such as when defendant Jones has broken his contract to sell his land to plaintiff Smith, and the court orders Jones to give title to the land to Smith upon payment of the price agreed to in the contract.

In all but quite minor cases the losing party may appeal the trial court's decision to a higher (appeal)

court. In a most important case, he may have a further appeal to a still higher court if he does not succeed on the first appeal. The highest court in each province is known as its Court of Appeal. The Supreme Court of Canada is the appeal court of last resort for both civil and criminal matters.

When an appeal is heard, no witnesses ordinarily appear before the appeal court, but their important evidence which was presented at the trial is made a part of a written record which is examined by the appeal court judges. Opposing counsel for the parties then argue points of law before the judges, as well as the conclusions to be drawn from the record.

In addition to the Provincial Courts, there is a Federal Court established to hear cases involving claims against the Federal Government or one of its agencies. Procedure in this court is similar to that in Superior Courts in the provinces, but there is no provision for jury trial. Appeals go to the Federal Court of Appeal and from there to the Supreme Court of Canada.

Enforcing The Law: The Criminal Prosecution

The Criminal Code of Canada defines crimes and fixes penalties for violations of the Code. The Criminal Code is enforced by the police and the criminal courts which are two important parts of the larger Criminal Justice system in Canada.

Although someone may be accused of a criminal offence, he may or may not be arrested. The Criminal Code sets out the situations where a Police Officer may exercise his discretion to arrest and those situations where he must not arrest. The basic philosophy behind this exercise of discretion is that unless there is a substantial reason for the arrest of the accused, he should not be taken into custody. The Code also requires that when an accused person has been arrested, unless certain circumstances exist, he must be released as soon as possible. There are, therefore, two ways by which an accused person may be brought before the court. A Police Officer or a private citizen may bring the accused person before the court either in custody, after arresting him, or out of custody, after he has been issued with a summons or an appearance notice.

1) The Criminal Court System

The criminal court system and the methods of criminal prosecution are similar throughout Canada

because both the substance and the procedures of criminal law fall within the lawmaking powers of the Federal Parliament. However, the provinces are responsible for setting up the criminal courts and thus the names and organization of the criminal courts vary somewhat from province to province. Although there are differences, in general, the criminal court, like the civil court, is a three-tiered system.

The lowest, and by far the busiest tier is the Magistrate's Court, (sometimes called the Provincial Court). In this court, which handles over 90% of all criminal cases, the magistrate or provincial court judge (appointed by the provincial government) sits alone, without a jury.

The second or intermediate tier is made up of the county or district courts. The third or highest tier is the Superior or Supreme Court of the Province. In the intermediate tiers some provinces provide that the judge may sit alone or with a jury while in other provinces there is no provision for a jury in the intermediate tier.

In the Superior Court the judge may sit with or without a jury in criminal cases. The Superior or Supreme Court generally has an appeal division, or Court of Appeal which may be considered a separate court; as such, it is the highest provincial court, constituting a fourth tier.

2) Classification of Offences

The Criminal Code classifies offences into three groups, namely, Summary Conviction offences, Indictable offences and Dual Procedure offences which allow the prosecutor to choose whether he will prosecute by Summary Conviction or Indictment.

There are two important differences between Summary Conviction and Indictable offences. In the first place, Indictable offences are tried by a more complex and formal procedure than are Summary Conviction offences. Second, the maximum penalty which can be imposed in a Summary Conviction is a $500.00 fine or six months imprisonment, or both. The Criminal Code provides that the Magistrate's or Provincial Court has exclusive jurisdiction over Summary Conviction offences and certain named Indictable offences. Other Indictable offences require the accused person to elect whether he wishes to be tried by the Magistrate/Provincial Court Judge alone, a

higher judge alone or a higher judge sitting with a jury.

Finally, more serious offences such as murder, rape or treason are the exclusive jurisdiction of the Superior Court and must be tried in the Superior Court usually with a jury.

3) The Criminal Trial

The criminal trial resembles the civil trial in many ways, including the use of the adversary system and the cross-examination of witnesses. However, in certain other respects it differs from a civil trial. One of the most important difference is in the "burden of proof". The accused in a criminal case is presumed innocent until it is proven beyond a reasonable doubt that he is guilty of the offence with which he has been charged.

The criminal trial opens with the prosecution evidence followed by the case for the defence. In most criminal trials the prosecution is undertaken in the name of the Queen (as representing the State) and is conducted by the Crown Attorney.

Mr. Justice Rand described the prosecutor's duties and responsibilities as follows:

> "It cannot be over-emphasized that the purpose of a criminal prosecution is not to obtain a conviction, it is to lay before the jury what the Crown considers to be credible evidence relevant to what is alleged to be a crime. Counsel have a duty to see that all available legal proof of the facts is presented, it should be done firmly and pressed to its legitimate strength but it must also be done fairly. The role of prosecutor excludes any notion of winning or losing." (*)

In a criminal trial the accused cannot be forced to give evidence; whether he does or not is entirely up to him and his lawyer. At the close of the evidence, the prosecution and the defence may each address the judge or jury. There will be a finding by the judge (or the jury if there is one) of "guilty" or "not guilty". If the finding is "guilty", the accused will be sentenced by the trial judge. If the finding is "not guilty", the accused will go free.

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* per Rand J. in *Boucher v. The Queen (1955) S.C.R. 16* at 23-24.

Legal Aid

The Federal and Provincial governments have agreed to establish a system of Government-funded legal advice and assistance to persons who cannot afford to pay the normal cost of legal services. These agreements oblige the provinces to make legal aid available to any financially eligible person who is charged either with an Indictable offence, or with a Summary Conviction offence where there is a substantial danger that a conviction would result in a jail sentence or loss of livelihood. (Additionally, some provincial legal aid programmes cover civil as well as criminal matters).

THE CITIZEN AND GOVERNMENT

Many aspects of our lives are the subject of regulations administered by government departments or public agencies. Typical of these regulations are those concerning licensing, public safety, employment standards, welfare and other benefits, deduction and payment of taxes, and maintenance of proper records and statistics. This "administrative law" is primarily enforced by special boards, such as the Highway Traffic Board, the Workmen's Compensation Board and the Unemployment Insurance Commission. Procedure before these boards is usually simpler, cheaper and more flexible than that before the courts. In order to ensure that hearings are conducted fairly and that boards do not exceed their authority, their decisions are generally subject to review by the courts. In the case of federal boards, the review is held before the Federal Court.

Where discrimination is alleged in relation to employment or the provision of goods, services, accommodations or facilities by federal departments or agencies, or by institutions such as banks, airlines, railways, etc. that fall within federal jurisdiction, the recently enacted Canadian Human Rights Act provides a new form of enforcement. For the purposes of the Act, race, national or ethnic origin, color, religion, age, sex, marital status, conviction for which a pardon has been granted, and, in matters relating to employment, physical handicap, are prohibited grounds of discrimination.

If a person feels that he or she has been discriminated against by one of these bodies, then he or she can file a complaint with the Canadian Human

Rights Commission. The Commission has the power to investigate the complaint, and if it is substantiated an order may be issued requiring that the discriminatory practice stop, and that the complainant be compensated for losses suffered and be given the opportunities previously denied.

AFTERWORD

Our legal system serves a vital purpose as a framework of order for Canadian lives. More than that, it incorporates the great principles of the supremacy of law, of liberty under the law, and of democratic and representative government, in which it is the citizens who decide, in the last analysis, what their laws shall be.

Our law must be maintained. This is a duty not only of government officials, lawmakers, judges, and policemen, but of all citizens. When we obey and help generally to uphold the law we are serving our own interests and those of our family and community.

The law must also continue to adapt, grow, and develop. Only then can it help regulate, justly and efficiently, the ever-changing and often urgent problems of our Canadian society. Many of the provinces, as well as the federal government, have established law reform commissions to assist, on a continuing basis, the adaptation of the law to meet the challenges of today. But the task of developing and improving the law, while it must be led by law reform commissions, bar associations, legislators, and others in similar positions, cannot be accomplished without general understanding on the part of citizens.

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